INDEX

Page

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENTS ON ISSUE

ISSUE NO. ONE 8

ISSUE NO. TWO 14

ISSUE NO. THREE 15

CONCLUSION 15

APPENDIX

A. Motion For Leave To Appeal From The Court of Appeals For Logan County 16

B. Appeal From The Court of Appeals for Logan County 17

C. Memorandum Opinion 18

D. Memorandum Opinion 27

AUTHORITIES:

Cases Cited:

State v. Robinson, 161 Ohio St. 213, 118 N.E. 2d 517 8

State vs. Schaffer, 17 OO (2d) 113, 177 N.E. 2d, 534 8

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

72-5816

ZARRELL D. CUMMINS,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

Petitioner was indicted in May, 1971, for first degree murder, and subsequently was tried by a jury and convicted of the lesser included offense of second degree murder and sentenced to life imprisonment. The District Court of Appeals affirmed the opinion of the trial court, denied reconsideration of its opinion and overruled a motion to certify to the Ohio Supreme Court. The Ohio Supreme Court then denied petitioner's leave to appeal for reason that no constitutional question existed.

JURISDICTIONAL STATEMENT

It is the belief of Respondent that Petitioner's conviction and review under the laws of the State of Ohio was consistent with the United States Constitution and its Amendments.

QUESTIONS PRESENTED

I. IS IT UNCONSTITUTIONAL FOR THE LAW TO PRESUME A MAN TO INTEND RESULTS WHICH ARE THE NATURAL, REASONABLE AND PROBABLE CONSEQUENCES OF HIS VOLUNTARY ACTS, AND IS IT UNNATURAL TO EXPECT DEATH AS A RESULT OF CONTINUOUS AND SEVERE BEATINGS AND BLOWS ADMINISTERED TO THE BODY OF A TWO YEAR OLD CHILD?

II. THE TRIAL COURT HAS NO DUTY TO INSTRUCT THE JURY TO DISREGARD A RESPONSE TO A QUESTION WHEN NEITHER AN OBJECTION IS RAISED TO THE QUESTION NOR A MOTION TO STRIKE IS DIRECTED TOWARD THE RESPONSE.

STATEMENT OF THE CASE

On April 16, 1971, at 4:50 a.m., the Petitioner, Zarrell Cummins, and his wife, Josephine, admitted to the Emergency Room at Mary Rutan Hospital, Bellefontaine, Ohio, Keith Byrd, 2 years and 10 months of age, the illegitimate child of Josephine. The 24 pound child was missing two lower central incisor teeth, his abdomen was seriously distended, there were scores of old red bruise marks measuring from ½ to 3 inches in diameter over his face, trunk, both arms and both legs. A large bruise was also noted on the back of his head. The Mary Rutan Hospital personnel, not being ready for immediate surgery, advised that the child be forwarded to Lima Memorial Hospital, Lima, Ohio, where he died shortly after arrival at 7:45 a.m. from multiple perforations of the jejunum and generalized peritonitis as a result of external trauma inflicted from two to six days prior to death. The Petitioner and his wife told medical and police authorities that the child had been accidently struck by the rear of one of the parties' cars at 10:00 p.m., the previous evening in the driveway

of their trailer home in Bellefontaine, Ohio.

The Petitioner and his wife used their other car to transport the child to the hospital so the car that was alleged to have been involved in the "accident" had not been moved from the scene of the claimed "accident".

The police, with assistance from the Bureau of Criminal Identification and Investigation minutely inspected the portions of the car that were supposed to have struck the child, the exact spot of the driveway where the "accident" was alleged to have happened and also the clothes the child was supposed to have worn at the time of the "accident" were submitted to microscopic analysis.

The microscopic analysis of the clothes, together with an examination of the under-body and rear of the car and the area of the driveway failed to reveal any indication of a recent accident as the dust on the car was not disturbed, nor was there any "trace" material found on the car, nor was there any dust, dirt, oil, etc., on the pajamas. The child's pajamas were the type that completely covered the child's feet and the soles were absolutely clean, indicating not only the impossibility of the "accident" but also the fact that the child could not even have walked on the dirt and stone driveway.

Furthermore, medical evidence revealed that the dozens of bruises on the body and the trauma causing death were inflicted from two to six days prior to death, and the body bore no fresh bruises or fresh wounds of any sort that would have been inflicted at the time of the claimed "accident". The Petitioner also tried to claim that the child bruised easily, but testimony from babysitters who have known or taken care of the child since birth negate this claim. Until the child was exposed to Petitioner he lived a normal, happy life and, outside of a normal childhood scraped knee, etc., showed no signs of bruising or other serious injury.

Common experience would also indicate the "accident" could not have happened as described by Petitioner. Since the

trauma causing death would have been inflicted in the area of the child's abdomen, the rear bumper of the car would have had to contact the child as he faced the rear of the car. Of course, that type of blow would have caused the child to lose his breath, throw him on his back, and rendered him immobile for several minutes. Petitioner's claim that the child was able to scream and was immediately found crawling out from under the car was refuted by not only the medical testimony but also by the juror's common experience.

The Petitioner and his wife evidently soon discovered how damaging the state's analysis of the child's pajamas was to their story and in consequence the state received at least three different versions of the whereabouts of the nightclothes. The following excerpts of the testimony taken at the bail hearing are indicative of the dangers inherent in the substitution of fiction for fact. The earlier parts of this cross-examination brought forth the admission that, although she had originally told the state that the pajamas worn to the hospital were the same clothes the child was wearing at the time of the "accident", the Petitioner's wife is now trying to maintain she changed the child's clothes twice between the "accident" and his admission to the hospital. The Petitioner is, of course, listening to her testimony from his counsel table, with the following results:

"Q. (Pros. Att.) But you have no idea where the clothes are he was wearing?"

"A. (Josephine Cummins) No."

ZARRELL CUMMINS: "T-shirt in city dump. It was torn and thrown in city dump."

MR. GOSLEE: "Shh-----"

MR.MacGILLIVRAY: "Let the record show the T-shirt was torn and thrown in the city dump."

"Q. Was T-shirt thrown in city dump? Did you hear your husband now?"

"A. I heard my husband, but I can't remember everything."

"Q. Was clothes torn when car hit boy?"

"A. I don't remember."

"Q. Did you hear your husband just now?"

"A. I heard my husband. I don't remember."

Three to four weeks prior to and up to the date of death, the child suffered a number of apparent serious or disabling injuries concerning at separate times his arm, head, back of his head, legs, teeth, and burns—in addition to the aforementioned scores of bruises. At the same time the child was suffering these injuries, the Petitioner was telling his close friends and acquaintances of his so called problems with raising his stepson and how it was necessary to punish him. For instance, the state, through the testimony of friends and acquaintances of the petitioner, offered proof that petitioner admitted to "belting" the child in the mouth and knocking him across the room, that petitioner referred to the child as "that little son of a bitch" and talked about having to belt his wife and child every night before he left home and "that he was going to make that kid respect him if he had to beat him to death." The Petitioner was not content with merely discussing his hatred for the illegitimate child but even

went so far as to show his friends the results of the severe beatings he was inflicting on the child.

From this and other pertinent testimony one can only infer that the Petitioner was proud of the results of his beatings and further that the beatings were going to grow in severity, and unless the Petitioner was somehow restrained, death was the only escape the tiny two year old had from his almost daily tortures.

Only four days before his death the child was taken to the dentist, Dr. William H. Bruce, who testified that, although the child's two front teeth were loose, the teeth had a good chance of being saved and that the teeth were embedded firmly enough that he would not have pulled them without an anesthetic. Yet within 24 hours, these teeth were missing and Petitioner's claim that he easily pulled these teeth with a pair of tweezers is untenable, in the face of the expert testimony of Dr. Bruce.

It can only be reasonably inferred that the missing teeth were the result of another severe beating, a beating which would have coincided within the time limits set forth by the pathologist. However, to try to pick out a time certain for the fatal assault is difficult, if not impossible, in that the beatings had almost become a routine affair, differing not so much as to severity and brutality but as to which part of the little body was the current target of Petitioner's malice.

Petitioner is confused about the medical testimony concerning the cause of death. The medical testimony given by the pathologist and the coroner was direct and certain as to the fact that a severe trauma or blow or blows inflicted 2 to 6 days prior to death injured the intestine and caused it to subsequently rupture and then, as a failure to heal, the rupture could occur perhaps only from internal pressure, without the necessity of further external trauma.

A careful review of the record indicates that the expert medical testimony firmly establishes death as a result of external severe trauma.

The testimony of the pathologist expressly rules out Peti-

tioner's claim of an automobile accident that was supposed to have occurred about 10 hours before death. Thus the possibility of the automobile accident as described by Petitioner was completely obliterated by the medical testimony.

The only possibility left for the jury to consider was whether the defendant maliciously inflicted the severe blow causing death. The other non-medical evidence, both direct and circumstantial, adequately portrayed petitioner's active hatred for and his brutal treatment of the two year old decedent.

It would appear that Petitioner has taken the layman's (and that of the entertainment media) view that circumstantial evidence is not good evidence, and has also failed to distinguish between drawing multiple inferences from one fact as opposed to drawing an inference upon an inference.

The expert medical evidence presented to the trial jury proves a "killing" beyond a reasonable doubt and eliminates all possibilities of death by natural causes.

Petitioner's brutal treatment and hatred of the child was proved by direct evidence of statement, made by the Petitioner. The battered two year old body was therefore not the only evidence of petitioner's malice and hatred, but merely another link in the chain. The state contended and proved that Petitioner not only lied about the decedent being struck by a car, but that Petitioner for a period of weeks carried on a systematic, brutal regimen of beatings that literally caused serious injuries to the child from his head to his feet.

The actual method used by Petitioner to inflict the final torture on the two year old decedent is known only to defendant. What is certain, however, is that because of the disparity in the size of the defendant and decedent, coupled with the two year old's inability to defend himself or escape, many severe blows were delivered by defendant to the body of the once healthy decedent and that death was and is the only natural and probable consequence of such continued torture.

In the instant case the evidence, both direct and circumstan-

tial, expert and otherwise, as to the nature of the injuries and to the state of mind of the accused, afforded the triers of fact sufficient ground to determine an intent to kill.

ARGUMENT ON ISSUES

I. IS IT UNCONSTITUTIONAL FOR THE LAW TO PRESUME A MAN TO INTEND RESULTS WHICH ARE THE NATURAL, REASONABLE AND PROBABLE CONSEQUENCES OF HIS VOLUNTARY ACTS, AND IS IT UNNATURAL TO EXPECT DEATH AS A RESULT OF CONTINUOUS AND SEVERE BEATINGS AND BLOWS ADMINISTERED TO THE BODY OF A TWO YEAR OLD CHILD?

The case of *State v. Robinson*, 161 Ohio St. 213, 118 N.E. 2d 517, cited by petitioner no more shifts the burden of proof than did the instant case. The fact in *Robinson* that defendant shot and killed decedent was not in issue, but whether or not the bullet wound was inflicted in heat of blood without time for passions to cool. The court in *Robinson* did not shift the burden of proof to defendant, but found that the state had presented sufficient evidence for the triers of fact to conclude that the accused had sufficient time for reflection and cooling off between the time of the alleged provocation and the time he fired the fatal shot.

Thus, neither this case nor the *Robinson* case shifted the burden of proof or presume malice from the bare fact of a killing, but rather the fact of malice is concluded from both the nature of the death and *from all the surrounding circumstances.*

It has long been the law of Ohio that a person is responsible for the natural and probable consequences of his voluntary acts. The case of *State vs. Schaffer*, 17 00 (2d) 113, 177 N.E. 2d, 534, involved the murder of an elderly woman by a young man, and, as in this case, involved homicide without the use of a deadly

weapon. Discussing the petitioner's apparent claim that intent and premeditation could not be proved because he did not use a deadly weapon, at Page 118 the Court of Appeals for Lawrence County, in upholding a first degree murder verdict, stated:

> "Under the rule that the law presumes a man to intend results which are the natural, reasonable and probable consequences of his voluntary acts, an intent to kill with deliberation and premeditation may be found to exist where a young man (131) of strength and vigor uses his hands and muscles to violently strangle an elderly, helpless woman. Under such circumstances, the hands may be found to be equivalent of a deadly weapon, and to constitute instruments likely to produce death when viciously employed to strangle."

> "This homicide (as indeed are most murders) was accomplished without the presence of witnesses. It was the province of the jury to draw reasonable inferences from the physical facts and extrajudicial statements of the defendant; it was likewise the right of the jury to draw the inference or presumption of fact that the defendant intended to kill Mrs. Remy, which result, in the normal course of events, would be the natural, reasonable and probable consequences of his vicious and unmerciful battery upon the body of the elderly person."

Certainly the above reasoning would be applicable to the defenseless 24 pound, 2 year old child in the instant case; and in this case, as in the aforementioned case, the relative size and strength of the petitioner and the decedent must be considered as must the battered condition of the child's body.

Other jurisdictions have been presented with similar cases of child beating resulting in deaths and based on facts similar to the instant case have been able to sustain either first or second de-

gree murder verdicts.

"In Williams v. State (1876) 57 Ga 476, the court upheld a murder conviction of the father of a boy about 2 years old, upon evidence that the father was heard to say that the child was of no account and he had a great mind to burst his brains out, that 2 days afterward the child was found dead in the defendant's house, much bruised about the body and head, with his feet burned, and that after his arrest the defendant stated that he had whipped the boy with a paddle or switch, that a cut on his head was produced by a blow inflicted with a box weighing 9 pounds, and that a bruise on his stomach was inflicted when he would not learn to walk, 'nastied' the floor, and the defendant kicked him out of the door." *89 ALR2d 417*

"In People v. Butler (1962) 205 Cal App 2d–, 23 Cal Rptr 118, a conviction of first degree murder of a stepson by brutal beatings was upheld under ordinary principles respecting the necessary intent, applicable to the accused's contention that he was borderline mentally, and at the time under the influence of pain-relieving drugs prescribed for him. There was evidence that he was rational when apprehended shortly after the death of the child, and conflicting expert psychiatric testimony. Referring to the extensiveness and brutality of the beatings administered, the court referred to the principle that when a homicide is perpetrated by torture, the means used are conclusive evidence of malice and premeditation, and the crime is murder in the first degree, and that although it is necessary to show intention to inflict suffering in order to establish murder by torture, such intention may be inferred from the condition of a decedent's body." *89 ALR2d 434*

"Although reversing a conviction of first degree murder for errors, the court in State v. Severns (1944) 158 Kan 453, 148 P2d 488, considered that a conviction of homicide in that

or in a lesser degree might, in a proper case and under proper instructions to the jury, be predicated upon evidence that because his 8-year-old niece, who was a member of his household, "was looking mad at him," or because she told falsehoods or both, the defendant compelled her to bend over with her hands on her ankles and whipped her with a wide belt, struck her in the face with his fists, knocking her down and drawing blood, then compelled her to stand on her head in a corner and while she was in that position kicked her in the face and body, and later picked her up by the ankles, and, with her head hanging down, bounced her head on the floor, which was wood with a linoleum covering, for 2 hours, and that the child became unconscious and fell or fainted, and died before she could be taken to a hospital and evidence that a post-mortem examination of the body showed many external and internal injuries, and injuries to the brain, although there was evidence that while the defendant admitted having participated in the punishment of the child, he stated that he at no time intended to kill her. It was held proper for the trial court to have instructed the jury on the law of murder in the first degree, upon the ground that whether the defendant's long-continued course of action was mere punishment for a breach of discipline, or done in the heat of passion, or maliciously done to effect death, was a question of fact for the determination of the jury."

"In Mobley v. State (1949) 227 Ind 335, 85 Ne2d 489, the court upheld a verdict of guilt of a mother of the second degree murder of her 3-year-old daughter, upon evidence that over a period of at least 2 weeks prior to the homicide she frequently spanked the child and without sufficient excuse beat her with a metal pancake turner, and on the day of her death spanked her at different times with her hands and with the pancake turner, that the child was beaten and bruised from her head to her feet, and that death ensued; evidence by doctors conduction the autopsy that there were numerous bruises, lacerations, and abras-

ions all over the child's body, and the brain appeared to be somewhat swollen, and medical opinion evidence which agreed that the child died from cerebral injury as the result of external violence, that the injury could have been caused by violence to any part of the body, the force of which could have been transmitted through the spine to the brain, and that it was not necessarily caused by a blow on the head." *89 ALR2d 418*

"In Clark v. State (1948) 151 Tex Crim 383, 208 SW2d 637, the court upheld the conviction of a man for the murder of his 5-year-old stepson, upon evidence of witnesses that they heard the defendant beating the child, who was crying and begging him to stop, one of them testifying that she heard the defendant tell the boy that he was not going to bed until he had learned to count, and heard him say that he was going to kill him; evidence that the defendant whipped the child at intervals until 2 a.m., and medical evidence that an examination of the body, made within 2 days, revealed that there were from 200 to 250 marks of violence all over it and bruises of considerable extent over the entire abdomen, that there was a hematoma about the size of a half orange under the scalp, and there was a hemorrhage beginning at the base of the brain and extending over the right lateral and posterior surface, which the witness said was the cause of death, that there were a number of fresh abrasions on the body which appeared to have been inflicted by some blunt, round instrument, and that the wound on the head, being extensive, appeared to have been inflicted by something blunt, rather than in a fall. The court approved, as sufficient, an instruction to the jury that is they believed from all the evidence beyond a reasonable doubt that the defendant unlawfully and voluntarily killed the boy by beating him, they should find him guilty of murder, and unless they so believed from the evidence beyond a reasonable doubt they should acquit him." *89 ALR2d 436*

"In People v. Jones (1960) Cal App 2d 335, 9 Cal Rptr 508, the Court sustained the second degree murder conviction of a woman to whom the care and custody of the deceased, a 3-year-old boy, had been entrusted by his mother, where although the accused maintained that the boy had hit his head on a doorjamb in running out of the room after a beating, there was evidence that death-causing head injuries, among others, had resulted from repeated blows. In addition, in view of the evidence of repeated and extended whippings, and assorted visible injuries to the boy's body, the court generally concluded that the jury was entitled to find that the boy had been brutally beaten about the head and body with "no considerable provocation," that his death was caused by a beating committed by the defendant intentionally, maliciously, and without lawful justification, malice being implied when no considerable provocation appears or when the circumstances show an abandoned and malignant heart." *89 ALR2d 438*

The aforementioned cases and other cases set forth in 89 ALR2d, beginning at Page 417, clearly indicate that in child beating cases the severity of the beating is a prime indicator of intent to kill; and that of necessity, the severity of the beating is to be judged by the condition of the child's body after the beating. In this case, the medical testimony and the photographs taken shortly after death clearly indicate the severity and the brutality of the child's sufferings.

However, in this case there is much more than the battered body to indicate that the child was suffering from beatings. Petitioner's admissions to Rose Smith, Sandra Billings, Emory Titus, Volney Wells and Gary Reprogle indicate not only his hatred for the cihld, but also clearly establish that he was torturing the child. His threat to "beat the child to death" unfortunately came true.

As the Court is aware, the inability of a child to seek refuge or report a parent that is mistreating him results in child

beating cases in general being difficult to prove. However, in this case, petitioner's boastful-like admissions to his friends concerning his treatment of the child adds additional strong evidence to the State's case.

It is clear that the child did suffer various beatings from time to time and bruises and injuries were coming and going on his body. The incident involving the missing teeth indicates another beating about 2-1/3 days prior to death. Although the State effectively destroyed the "accident" story of petitioner, the time of this supposed "accident" is relevant to the State's case. Why did the petitioner select 10:00 p.m. of the evening preceding death as the time of the "accident"? At this point, one should consider the testimony of his neighbor, Mildred Godwin, concerning the noises she heard at about this same time. It is also well to remember that Dr. Andjus testified that although the blow that ruptured and severely weakened the intestine came between 2 to 6 days prior to death, the actual perforations could have occurred naturally or been triggered by another blow.

One can, therefore, reasonably infer that the time of the accident was consciously selected by the petitioner in order to cover what he thought was the fatal beating. It can also be inferred that the child spent several hours of acute suffering from that time onward until it became apparent to petitioner and his wife that the child was near death and that admitting the child to the hospital would be less onerous than having to explain the dead body on their premises. The testimony of the nurse that received the child at the hospital, Henrietta Zahniser, clearly indicates that the child was in extremis and that he had been dying for some time.

II. THE TRIAL COURT HAS NO DUTY TO INSTRUCT THE JURY TO DISREGARD A RESPONSE TO A QUESTION WHEN NEITHER AN OBJECTION IS RAISED TO THE QUESTION NOR A MOTION TO STRIKE IS DIRECTED TOWARD THE RESPONSE.

Petitioner's Point II is directed to the response to one question asked one State's witness concerning a telephone conversation the witness had with the petitioner. No objection was made to the question nor was a motion made to strike the response, and no claim can be made that there was no opportunity to so act.

The procedural law in Ohio is the same as Rule 51 of the Federal Rules of Criminal Procedure. Defendant cannot speculate with the jury by letting error go by unremarked and then seek a new trial if the verdict is unfavorable to him.

III. It should be here noted that petitioner in his Point III raised the issue that the case against him was based solely on circumstantial evidence. As the record to date clearly indicates that this is not true, respondent can see no need to reply to an argument, that if valid, simply does not fit the case at hand.

CONCLUSION

In conclusion, we respectfully submit that there are no matters of great public interest nor are there any violations of petitioner's Constitutional rights for the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

DOUGLAS D. MacGILLIVRAY
Prosecuting Attorney

RONALD E. HADLEY
Ass't. Prosecuting Attorney
Attorneys for Respondent

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

No. 72-466

STATE OF OHIO
Appellee,

vs.

ZARRELL D. CUMMINS,
Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR LOGAN COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Mancino, Mancino & Mancino

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this 8th day of Sept. 19 72

/s/ Thomas L. Startzman Clerk

_____ Deputy

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

No. 72-466

STATE OF OHIO,
Appellee,

vs.

ZARRELL D. CUMMINS,
Appellant.

APPEAL FROM THE COURT OF APPEALS FOR
LOGAN COUNTY

This cause, here on appeal as of right from the Court of Appeals for LOGAN County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for LOGAN County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this 8th day of Sept. 19 72

/s/ Thomas L. Startzman Clerk

_____ Deputy

APPENDIX C

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

CASE NO. 1098

STATE OF OHIO
Plaintiff/Appellee

vs.

ZARRELL D. CUMMINS,
Defendant/ Appellant.

Appeal: Court of Appeals for Logan County

MEMORANDUM OPINION

MR. DOUGLAS D. MacGILLIVRAY
Prosecuting Attorney, for Appellee
MESSRS. GOSLEE & GOSLEE
Attorneys for Appellant

COLE, J. This is an appeal from a judgment of conviction and sentence for murder in the second degree. The defendant-appellant was the stepfather of the infant victim and the theory of the prosecution's case was that the defendant chastised the two and a half year old boy by severe beatings which led to internal bruises in a portion of the small intestine, leading in turn to ultimate perforation, peritonitis and death. The theory of the defense was that the child was inadvertently struck by an automobile being backed by defendant-appellant leading to a perforated intestine and death. There are sharp conflicts of fact in the evidence, the trial involving some fifty-two witnesses over many

days.

The appellants first, second, third, fifth and seventh assigned errors are based essentially upon questions as to the adequacy of the evidence to sustain the conviction as that evidence applies to specific elements of the alleged crime such as venue, the act of beating the child leading to the internal injuries and intent. We will deal first with these basic areas and, at this point, with the question of the adequacy of the evidence to establish the criminal act.

The evidence submitted by the prosecution is not direct evidence of a witnessed act of the defendant beating the child at a time and in a manner sufficient to cause the fatal injury. It constitutes instead a series of facts which inferentially lead to the conclusion the defendant so acted. It is here, therefore, an issue is created as the validity of these inferences as predicated upon the evidence presented. Was there sufficient evidence, if believed by the jury, to lead by valid inferences to the conclusion that the defendant struck the child in such a manner and at such a time as to lead to the fatal internal injuries?

There is ample evidence to justify the inference that the defendant intended to and did chastise his stepson by not only paddling him but also by striking him on other parts of his body with such force as to have serious internal effects.

a.) Emory Titus testifies that on Good Friday (April 9, 1971) the defendant said: "**** his grandmother (the child's) pampered him too much and he was going to make him mind him, and he pulled up - he turned Keith around, back facing me, pulled down his pants and raised his shirt, and he had bruises from the butt all the way up his back." (R.70). Later Titus says: "**** Well, Keith wasn't high enough to reach the door handle on the flight steps, so Zarrell went up and hit him, helped him in the doorway, ****." Still later, " **** Keith dumped out the screws; again, Zarrell scolded him, hit him on the butt, ****."

b.) Volney Wells testified that on the same day the defend-

ant said the boy "had been bulling the night before, so he busted him in the mouth with his fist. ****so he hit him in the face with his fist and knocked him across the room." Later, "he was going to break him of the habit, one way or the other." The child Keith he observed to be bruised in several places.

c.) Rose Smith testified that around February or March the defendant told her he was having a discipline problem with the child, "Well, he just said he was holding the little boy one day; the little boy wet on him, and he beat the shit out of him." (R. 48).

d.) Sandra Billings testified that about a week prior to the death the defendant said he was having trouble with the boy, "That he had to punish him all the time; he said every night before he left for work, he belted him and his wife both so they would remember. **** I never haerd him call him Keith; all he ever, I ever heard him call him was that little son-of-a-bitch. **** He said he was going to make the kid respect him if he had to beat him to death." (R. 55).

From this testimony and that of other witnesses we may infer that the defendant disliked the child, that he talked of a general program of physical beatings of the child to discipline him, that he demonstrated that he had in fact carried out his program and proposed to continue to do so in the future. From the words attributed to him by these witnesses "beat him", "belt him", "busted him in the mouth", "hit him in the face and knocked him across the room", it can be inferred this program of discipline entailed not just paddling the boy but severe and indiscriminate beatings involving all parts of his body.

There is further evidence that the defendant claimed responsibility for the bruises on the child's body as demonstrating the fact he had carried out this program. There is, of course, the evidence of Wells and Titus as to Good Friday. Later, however, on Easter evening (April 11) the defendant, his wife and stepson visited at the residence of Gary Reprogle who testified: "He

said he had to give his little kid an ass kicking, and his old lady, too. I was telling about the little boy (the Reprogle's boy) pulling over a pan of soup, was what the conversation was; he said, 'I give my little boy an ass-kicking, and old lady, too." He says that the child Keith was not feeling well and they put him on a bed. "And we went back in the front room, said to my little boy, said, 'you ain't pulled no soup on you'. He said, 'You don't think I whipped Keith, do you'?" They then went to the bedroom where he took off Keith's shirt and showed Reprogle his back which was "black and blue **** all up and down his little back." (R. 99).

From this we can infer without difficulty further beatings of a severe nature, and that the bruises on Keith's body were evidence freely shown by him to others of the beatings.

Between Good Friday and Easter the child's two front teeth were loosened requiring visit to a dentist who testified they were not loose enough to require pulling. Nevertheless, they were gone by Wednesday after Easter. One Cheryl Foote, a baby-sitter, who testified that on this day, three days after Easter, the child showed bruises on his face and cheeks that had not been there the week before.

We, therefore, have sufficient evidence of probative value to justify the inference that the defendant was carrying out his program of discipline by severe physical blows which left bruises on the child which the defendant not only admitted were caused by him but also that he in effect took an odd sort of pride in this evidence of his physical chastisement. The evidence is sufficient to justify an inference that this general program of action continued from Good Friday to April 16, 1971, on the morning of which the child died. In short that the defendant without regard for what part of the child's body he hit, continued to physically maltreat the boy.

It next becomes necessary to consider the medical evidence.

Basic to the prosecution's case is the medical concept as to the chain of causation leading to death. Dr. Noble, the coroner of

Allen County, (death occurred in a Lima,Ohio hospital in Allen County) testified that the cause of death was peritonitis due to a ruptured small intestine because of trauma. (R.114). The blows in his opinion were to the abdomen; the child had many bruises over its body and the bruises were several days old. He testified these bruises were due to blows of some sort. He stated further that the small intestine had perforated through two holes causing the peritonitis and this rupture was the result of the trauma.

Thereafter, a pathologist named Dr. Andjus testified that on autopsy several bruises were revealed on the small intestine mainly on the jejunum and two of these bruises had ruptured. There was also an internal bruise in the vicinity of the head of the pancreas. Both the injury to the pancreas and to the small intestine he said had occurred two to six days prior to death (R. 136). The next portion of his testimony indicates the internal bruise would not necessarily be fatal at once but could have begun to heal and later, on some internal pressure, break.

Thus the prime cause of death as presented by this testimony was a trauma or blow or blows bruising the small intestine, weakening it and leading to a potential rupture. The initial cause could have occurred as much as six days prior to death. Then, as a failure to heal, the rupture could occur perhaps only from internal pressure with fatal results.

Dr. Noble testified all the bruises were approximately the same age, i. e., several days, prior to death. This directly contradicted the defendant's contention of injuries due to an accident at 10:00 P.M. the night before death occurred (R. 121). He testifies to, and the exhibits demonstrate, multiple bruises all over the child's body. (See also R. 131). On page 125 of the transcript he states, "Well, based on the autopsy findings, this child received a blow or blows to the abdomen which injured the small intestine, and this happened several days before the child became ill and died." The blow necessary to such injury was described as follows (R. 126):

"**** such a blow to the abdomen that would result in this

internal injury at the time of the original injury would be severe enough to knock the wind out of the child, render it incapable of doing much more than gasping for breath and crying for a period of minutes. ****"

This testimony directly establishes the need for a severe blow to account for the injury and one occuring between 2 to 6 days prior to death. The normal falls and bumps common to childhood do not reach such severity but it is apparent from the testimony that the defendant carrying on a program of beating on the child's body to achieve discipline did produce multiple bruises and these blows were commensurate in severity with the blows required by medical testimony to produce the injury found. It may, therefore, be inferred the injury was so produced within the period from April 10 to April 14, 1971, by the Defendant. There is, therefore, sufficient evidence to permit valid inferences that the defendant committed the act resulting in the death of Keith Byrd.

This being resolved the appellant further contends there is no evidence of venue, i.e., that this criminal act occurred within Logan County, Ohio. The situs of the trailer in which the defendant, his wife and stepson lived is established at being in Alloway's Trailer Court, Bellefontaine, Logan County, Ohio (R. 68). This is where the defendant was most closely associated with the child and in particular from Easter to the date of the death which is the basically crucial period (R. 398). This would permit the jury to find the criminal act occurred in Logan County, Ohio.

Finally, we come to the problem as to intent. This is a charge of murder in the second degree and as such requires:

1. An intent and purpose to kill, and
2. Malice, but not deliberate and premeditated malice.

State v. Esherick, 19 Ohio App. 2d 40.

Although the evidence so far considered was sufficient to justify the finding by the jury as to the commission of an act by the defendant leading to the death of the child the question now is:

Was that evidence sufficient to justify a finding of an intent to kill?

Although there is direct testimony by Sandra Billings, "He said he was going to make the kid respect him if he had to beat him to death", it is difficult to justify from this alone a specific intent to kill the child. The purport of most of the statements attributed to the defendant is that he intended to discipline or chastise the child using his hands and beating and hitting him. However, there seems to be no evidence of a *statement* of the defendant justifying a direct inference as to an intention to kill.

However, in Ohio such an intent to kill may be found if the defendant did *an act* the natural and probable consequences of which would cause the death of the child.

> "Case law establishes the rule that the law presumes a man to intend results which are the natural, reasonable and probable consequences of his voluntary acts, and he is not presumed to intend results which are not the natural, reasonable or probable consequences of such act."

State v. Schaffer, 113 Ohio App. 125. See also State v. Farmer, 156 Ohio St. 214; State v. Stewart, 120 Ohio App. 211; State v. Swiger, 5 Ohio St. 2d 151.

Thus, in addition to what a person says the characteristics of the act itself are evidence of intent in the light of the existing circumstances.

> "The intent of accused must be gathered from the surrounding facts and circumstances under proper instructions from the court."

State v. Powell, 142 N.E. 2d 244; 75 O.L.A. 33. See also State v. Huffman, 131 Ohio St. 27; State v. Swiger, supra.

Here then there being credible evidence from which a jury could find the defendant in the course of chastising the deceased child struck him a blow so severe as to directly or indirectly cause the bruises which led to death, what can be inferred from that act in the circumstances then existing?

Perhaps the most pertinent of those facts and circumstances

is the relative size and strength of the two. The defendant was physically before the jury. He characterizes himself (R. 503) as big and strong. The deceased child was about two years and ten months old, relatively small and weighed some twenty-five pounds.(see Exhibit 27, et seq.). Such a child is delicate and easily subject to injury from a blow which might not seriously affect an adult. It may be inferred that a blow of the hand or fist could produce severe injury to such an infant. The differences in size and weight would permit an inference that a heavy blow could have disastrous consequences and the jury would, therefore, be justified in finding he, by acting, intended those disastrous and ultimately fatal consequences. State v. Schaffer, supra; State v. Powell, supra.

We, therefore, determine that none of the foregoing assignments of error are well taken.

The defendant assigns as his fourth assignment of error the testimony of one Wanda Henry who repeated an obscene remark made to her by the defendant during the course of a telephone conversation. (We find nothing prejudicial in her testimony up to this statement. Although, this preliminary portion of her testimony is of questionable relevancy it is not prejudicial to the defendant.) The statement by the defendant (R. 90) of an obscene nature was in response to a question which defense made no objection, and no motion to strike the response was made, nor any request to the court to direct the jury to disregard it.

We are cited to a statement in State v. Crafton, 15 Ohio App. 2d 160 for the proposition that a duty rested on the court to sua sponte reject the evidence, We note, however, that objection to the testimony in that case *was* made and sustained. The sua sponte duty was to instruct the jury to disregard the testimony. Here no objection was made at all to this statement and it cannot be said a duty was upon the court to sua sponte make such an objection for a defendant and that failure to intervene was error.

The assignment of error is not well taken.

The sixth assignment of error deals with the use of a rebuttal witness to testify as to certain conversations which occurred some five months prior to the date of death. The essence of the objection is that the cross-examination and rebuttal were on purely collateral matters.

One of the basic contentions of the defense was that he had splendid, friendly relations with the infant stepson and a number of witnesses testified to how well they got along. This testimony was directed to strengthening the defense contention that the defendant never struck the boy violently - a inference to be drawn from the character of his alleged friendly relationship. This relationship is thus pertinent and both the cross-examination and the rebuttal testimony is directed to weakening this basic inference. It thus goes directly to the merits of the defense.

The assignment of error is not well taken.

The eighth and last assignment of error is directed to other unspecified errors and is not made specific by oral argument.

None of the errors assigned being well taken the judgment of the trial court is affirmed.

Judgment affirmed.

GUERNSEY, J. (Presiding), and SHERER, J., concur.

(SHERER, J., of the Second Appellate Judicial District, sitting by designation in the Third Appellate Judicial District.)

APPENDIX D

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

No. 1098

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

ZARRELL D. CUMMINS,
Defendant-Appellant.

MEMORANDUM OPINION

MR. DOUGLAS D. MacGILLIVRAY
Prosecuting Attorney, for Appellee
MESSRS. GOSLEE & GOSLEE; MESSRS. MANCINO MANCINO & MANCINO,
Mr. Paul Mancino, Jr., of counsel, for Appellant

PER CURIAM. This cause came on further to be considered on defendant's application for reconsideration.

It is first argued that the entire case against the defendant was based on circumstantial evidence. It is true that whether defendant inflicted the fatal blow is circumstantial, or inferential, but the case against defendant is likewise based on direct evidence as to defendant's treatment of and as to statements made by him with reference to the deceased child.

It is argued that the evidence was insufficient to establish guilt beyond a reasonable doubt. The mere existence of circumstantial evidence does not preclude proof beyond a reasonable doubt. The original opinion of this Court analyzes in detail the

evidence from which the jury could have and did find the defendant guilty beyond a reasonable doubt. Although inferences are necessarily envolved, as is the case in all cases of circumstantial evidence, nevertheless inferences are not piled on inferences, but are combined with additional facts or other inferences from other facts to arrive at the ultimate elements essential to the prosecution's case, which the jury chose to believe.

It will be noted that the defendant's statements as to his infliction of corporal punishment on the child are not limited to statements as to blows only to the back and buttocks. See memorandum opinion pages 2 to 5, inclusive. The medical evidence combined with police testimony as to the absence of traces of an alleged automobile accident permit a finding that such an accident did not in fact occur and hence could not be an alternative cause of death, or that if it did occur it would not in any event be an intervening cause of death, for the basic injury to the intestine which thereafter resulted in the ruptured intestine and peritonitis causing death occurred in all medical probability several days prior to the death. From such evidence the jury could properly conclude that death was caused by a blow struck by the defendant several days prior to the time of death

This court did not, as claimed by appellant, express an opinion that there was only evidence of an indirect connection between the original bruises to the intestine and the ultimate peritonitis causing death. The terminology simply indicated, in context, the lapse of time between such injury and the peritonitis.

It is argued that the intent to kill was not established. This is incorrect. The presumption that one intends the natural, reasonable and probable consequences of his acts combined with the relative size, strength and stamina of the defendant and the child lead to a conclusion the defendant intended both the act of striking *and* its attendant direct and proximate results under such circumstances. With a small child of delicate constitution a

large fist wielded by a fully grown large man can be a lethal weapon.

It is argued that malice was not established. However, malice may be presumed from fact of killing. State v. Robinson, 161 Ohio St. 2d 213; State v. Eaton, 19 Ohio St. 2d 145.

There were moreover statements by the defendant in evidence indicating an active hatred for the infant combined with evidence of an active expression of that hatred.

The other matters were not assigned as error nor were they argued orally or in briefs.

Motion for reconsideration denied.

GUERNSEY, J., (Presiding), COLE AND SHERER, J.J., concur.

(SHERER, J., of the Second Appellate Judicial District, sitting by designation in the Third Appellate Judicial District.)

SERVICE

A copy of the foregoing Reply Brief of Respondent in Opposition to Petition for Writ of Certiorari was on this 2nd day of January, 1973, mailed to Paul Mancino, Jr., Attorney for Petitioner, by depositing a copy of the same in the United States Mail, postage pre-paid, addressed to One Public Square Building #1001, Cleveland, Ohio 44113.

Ronald E. Hadley
Attorney for Respondent